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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DELORA J.W. SANFILIPPO,

Plaintiff and Respondent,

v.

TRISTAN TRINH,

Defendant and Appellant.

H045575

(Santa Clara County

Super. Ct. No. 17-CV-316645)

An unlawful detainer judgment was entered against defendant following a court trial. Defendant argues the judgment is premised on an invalid three-day notice to pay rent or quit, and that the attorney's fees and costs awards are not supported by evidence in the record. We must affirm the judgment awarding plaintiff the premises plus holdover damages, attorney's fees, and costs because defendant and his attorney, Jonathan C. Do, have provided us with an inadequate record to assess his contentions. He therefore cannot meet his burden of demonstrating reversible error.

**I. BACKGROUND**

Defendant took over an existing commercial lease with plaintiff to operate a restaurant beginning in 2004. Under the lease, defendant agreed to pay plaintiff \$4,757 per month (\$4,032 base rent plus \$725 for common area maintenance). Defendant continued to occupy the premises after the lease expired in 2009. In April 2015 plaintiff notified defendant by letter that effective May 1, 2015, the total monthly rent would be \$6,611 (\$5,740 base rent plus \$871 for contributions to common area maintenance,

property tax, and insurance). The letter included an itemized statement reflecting a past due balance of \$75,765 and a demand for payment of the arrears. According to the statement, defendant was charged \$6,546 each month from July 2013 to August 2014, and \$6,570 each month from September 2014 to March 2015. Property tax, insurance, and maintenance contributions varied, but the base rent of \$5,740 did not change. The statement reflected defendant's payments of \$4,800 each month from January 2014 to April 2015.

On September 8, 2017, plaintiff offered defendant a five-year lease with monthly rent (including maintenance, property tax, and insurance contributions) of \$8,259. Defendant did not accept the offer. Two weeks later, plaintiff sent defendant a 30-day notice to terminate the tenancy effective October 31, 2017, along with an updated itemized accounting reflecting \$122,683 in delinquent rent. Five days later, plaintiff personally served defendant with a three-day notice to pay rent or quit the premises. The notice stated "there is now due and payable estimated unpaid delinquent rent of \$79,040.51" for the month-to-month tenancy from October 1, 2016 to September 30, 2017.

Plaintiff filed an unlawful detainer complaint on October 2, 2017 alleging defendant failed to vacate the premises after being served with the three-day notice, which was attached as an exhibit to the complaint. Plaintiff alleged defendant occupied the premises under a written lease that expired in 2009; the tenancy then continued by operation of law on a month-to-month basis with a rent increase to \$5,740; defendant refused to pay the current rent; and defendant did make monthly payments in a lesser amount which plaintiff applied to the oldest amounts due. An updated accounting showed \$58,000 paid by defendant between October 1, 2016 and September 30, 2017, the period referenced in the three-day notice. Plaintiff alleged that the amount of unpaid rent for that year was \$79,041, as stated in the three-day notice. She requested restoration of

possession, \$220 holdover damages for each day defendant continued to occupy the premises after October 1, 2017, attorney's fees, and costs.

Plaintiff filed an amended complaint later in October seeking the same relief, and a supplemental complaint in November adding that defendant had been given 30 days' written notice terminating the month-to-month tenancy on September 22, 2017, and seeking holdover damages from November 1, 2017. The September 22nd letter and accounting were incorporated into the supplemental complaint.

A court trial was held on January 18, 2018. The proceedings were not reported by a court reporter. Defendant was not present, and Mr. Do appeared on his behalf. The court entered judgment in favor of plaintiff, who was present with her attorney. The court ordered defendant to pay plaintiff \$24,200 in holdover damages (\$220 per day from October 1, 2017 to the trial date), \$33,276.50 in attorney's fees, and \$1,663.03 in costs. The unlawful detainer judgment reflected on Judicial Council Form UD-110 does not include any factual findings.

Defendant filed a timely notice of appeal. He did not provide a settled statement to serve as a record of the oral proceedings, and he elected to use an appendix in lieu of a clerk's transcript.

## **II. DISCUSSION**

### **A. THE UNLAWFUL DETAINER JUDGMENT**

A tenant in default for failing to pay rent is subject to a judgment of unlawful detainer when he or she continues in possession of real property without curing the default after being served with a three-day notice. (Code Civ. Proc., § 1161, subds. 2 and 3.) In the case of a commercial tenancy, if the amount stated in the notice is clearly identified as an estimate, the tenant is subject to a judgment for possession if the trial court determines the estimate is reasonable. (*Id.* at § 1161.1, subd. (a).) An estimate is presumed to be reasonable if it falls within a 20 percent differential of the amount determined by the court to be due. (*Id.*, subd. (e).)

Defendant argues that the three-day notice is invalid because it does not account for the \$58,000 he paid plaintiff during the 12 months covered by the notice. Defendant characterizes the April 2015 letter as a retroactive rent increase to January 2014, and he therefore challenges the past due amount of \$75,765 included there. As we understand defendant's argument, if no arrearages had accrued before April 2015, and had the \$58,000 paid between October 2016 and September 2017 been applied against arrearages accruing only after April 2015, the delinquent amount shown on the three-day notice would have been reduced by approximately \$26,000. That would render the estimate provided in the three-day notice (\$79,041) unreasonable and the notice would therefore be invalid.

Defendant also challenges the three-day notice under Code of Civil Procedure section 2076, which requires "[a] person to whom a tender is made..., *at the time*, [to] *specify* any objection he may have to the money..., or he must be deemed to have waived it." (Italics added.) Defendant asserts that by accepting \$4,800 monthly payments starting in 2011, plaintiff waived the right to claim a greater amount due. As a result, the amount shown as due on the three-day notice would be inaccurate because it applied defendant's payments to non-existent arrears.

Defendant cannot meet his burden of proving error on appeal. He did not request a settled statement or otherwise supply any record of the oral proceedings as required under California Rules of Court, rule 8.137.<sup>1</sup> "A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional

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<sup>1</sup> California Rules of Court, rule 8.120 states that the "normal record on an appeal" in a civil case *must* include a record of the oral proceedings "[i]f an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court." (Cal. Rules of Court, rule 8.120(b).) Counsel for appellant has prepared a record on appeal that fails to meet the basic requirements of an appellate record.

doctrine of reversible error.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Defendant does not dispute that the April 2015 letter (which is substantial evidence supporting the validity of the three-day notice) was admitted in evidence at trial.

Defendant urges that he should prevail as a matter of law based on the record before us. But his argument presupposes factual findings related to the terms of his tenancy and waiver under Code of Civil Procedure section 2076 that are not in our record. Indeed, there is no record of defendant preserving any error in the trial court related to the estimated amount of unpaid rent, and his comments to this court at oral argument suggest that he may not have done so.<sup>2</sup> Defendant’s bare argument to this court does not establish error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574–575 [“a party challenging a judgment has the burden of showing reversible error by an adequate record”].)

Citing *Stoltenberg v. Harveston* (1934) 1 Cal.2d 264, defendant argues that by accepting monthly payments of \$4,800 beginning in 2011, plaintiff is estopped from claiming a greater amount is due. The Supreme Court in *Stoltenberg* observed that an oral agreement to reduce rent is executed and enforceable when payments made under the agreement are accepted as rent in full. (*Id.* at p. 266.) Defendant has failed to demonstrate that the rule recognized in *Stoltenberg* applies here. Without a record of the proceedings, we are unable to evaluate his contention. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [rejecting claim that cannot be evaluated without adequate record].) We do not know what evidence, if any, was presented to support the existence of an oral agreement, nor do we know whether the trial court made any findings regarding such an agreement.

Defendant further argues that the trial court erred by excluding as hearsay a written agreement setting monthly rent at \$4,800. Defendant refers to his trial exhibit C,

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<sup>2</sup> Mr. Do told this court he did not have “the chance or the opportunity” in the trial court to “detail[]” the arguments presented on appeal.

which the parties agree was not admitted in evidence. Exhibit C appears to be a May 2011 e-mail from plaintiff's property manager memorializing a discussion in which the minimum monthly rent was reduced to \$4,032. The e-mail instructs defendant to pay \$4,933 per month (\$4,032 plus \$901 to offset maintenance and taxes) and comply with a payment schedule for arrearages, and informs defendant that he will be contacted by the owner to discuss a new lease. Defendant argues the e-mail should have been admitted as the admission of a party opponent. But without a record of proceedings he cannot show that he asserted admission by a party opponent under Evidence Code section 1220 as an exception to the hearsay rule, or even that he laid a proper foundation to admit the e-mail (according to plaintiff, neither the author nor the recipient was present at trial to authenticate the writing).

#### **B. ATTORNEY'S FEES AND COSTS**

Defendant argues that the attorney's fees and costs awards should be reversed because the amounts are not supported by evidence in the record. He complains that plaintiff did not submit a memorandum of costs or any detailed time records to establish reasonableness, and the attorney's fees were calculated without using a lodestar. Here again, without providing us a record of the trial court proceedings, defendant cannot meet his burden on appeal of showing reversible error. Defendant's argument that the trial court was required to apply a lodestar fails for the additional reason that a lodestar is used to calculate statutory attorney's fees in contingency cases. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.) The attorney's fees here are contractual, not statutory, based on the fee provision of the lease.

Defendant argues that attorney's fees cannot be awarded under the original lease because it expired in 2009, and the provision deeming any "holding over" to be a month-to-month tenancy subject to all terms and conditions of the lease does not apply given plaintiff's statement in the April 2015 letter that "there are no written agreements of any type, kind or nature whatsoever governing [defendant's] tenancy." "The doctrine of

equitable estoppel ... rests on the theory that the party to be estopped *may not prove certain facts* if he has by his conduct or declarations misled another to his prejudice.” (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249, fn. 7.) No prejudice is shown on the slender record before us. In answering plaintiff’s complaint, defendant himself sought attorney’s fees to defend against the unlawful detainer action, which suggests to us he did not rely on statements in the April 2015 letter.

### **III. DISPOSITION**

The judgment is affirmed. Plaintiff is awarded costs on appeal. Plaintiff may address any motion for attorney’s fees on appeal to the trial court. (Cal Rules of Court, rule 3.1702(c).)

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Grover, J.

**WE CONCUR:**

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Greenwood, P. J.

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Danner, J.

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